First Termite Control Co., Inc. *and* David White.
Case 32-CA-1685

December 16, 1982

SUPPLEMENTAL DECISION

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 7, 1982, Administrative Law Judge George Christensen issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge.[1]

[1] On January 28, 1982, this matter was remanded to the Regional Director for Region 32 for the limited purpose of reopening the record to take further evidence on the Board's jurisdiction over Respondent in accord with the remand from the Court of Appeals for the Ninth Circuit, *N.L.R.B.* v. *First Termite Control Co., Inc.*, 646 F.2d 424 (1981). Inasmuch as the court did not reach the issues of whether or not jurisdiction would be established over Respondent by virtue of the application of the retail standard, had the proffered freight bills been found admissible, and whether or not a reinstatement order is appropriate, Respondent's exceptions to the Supplemental Decision are hereby denied in their entirety.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: This case began in December 1978 when the Company discharged employees David White, Donnie White, Stephen Madison, Jimmy Rae Harris, and William Lytle. On April 3, 1979, David White filed a charge with Region 32 of the National Labor Relations Board alleging the Company discharged the five for engaging in concerted activities protected by the National Labor Relations Act, as amended, and sought appropriate relief. The Region issued a complaint based on that charge on May 16, 1979. Administrative Law Judge Welles held a hearing on the issues raised by the complaint on August 16, 1979, and on October 29, 1979, issued his Decision finding the complaint supported by the evidence and recommending the Company be ordered to cease its discrimination, reinstate the five, and make them whole for any economic losses they suffered by virtue of the discrimination against them.

During that proceeding, the Company objected to the introduction into evidence of two bills of lading purporting to show delivery by a rail carrier, Southern Pacific Transportation Company (SP) of lumber of the type delivered to the Company by its supplier, Economy Lumber, from points outside of California. Administrative Law Judge Welles overruled the objection and admitted the bills of lading under the business records exception to the hearsay rule contained in the Federal Rules of Evidence, Section 803 (6).

In a January 29, 1980, Decision, the Board adopted Administrative Law Judge Welles' Decision and ordered company compliance with the remedy Administrative Law Judge Welles recommended (247 NLRB 684).

On May 29, 1981, the Ninth Circuit Court of Appeals denied the Board's petition for enforcement of its Order on the ground evidence used to establish the jurisdictional requirement of interstate commerce under the Act (the two bills of lading) were inadmissible under the business records exception because the witness who sponsored their introduction into evidence (Economy Lumber's bookkeeper) was not an employee of the carrier who prepared the bills, she was unfamiliar with the industry practices in preparing its bills, she had no interest in assuring the accuracy of the information contained in the bills, and she was unable to vouch for the accuracy of the information set out therein; on August 5, 1981, on application by the Board, the court modified its May 29, 1981 Order and remanded the case so the Board could reopen the record and take further evidence concerning the issue raised by the court's decision (646 F.2d 424).

On January 28, 1982, the Board issued an Order reopening the record and directing Region 32 to schedule a hearing before an administrative law judge to receive evidence concerning the issue raised by the court's Decision and issue a Supplemental Decision thereon. On February 2, 1982, Region 32 set the hearing for May 4, 1982. On February 23, 1982, the Company requested a postponement of the hearing to a later date. On February 26, 1982, Region 32 rescheduled the hearing for June 4, 1982.

On June 4, 1982, I conducted that hearing at Oakland, California. The parties appeared by counsel and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, to argue, and to file briefs. Briefs were filed by the General Counsel and by the Company.[1]

[1] Prior to the close of the June 4 hearing, I granted the parties' request to submit briefs and directed the briefs arrive at my office on or before July 5, 1982. Counsel for the General Counsel filed a timely request for extension of the time for the filing of the briefs to Monday, July 19, 1982, without objection of the Company, which was granted. Counsel for the General Counsel timely filed her brief; counsel for the Company, however, placed his brief in the mails on July 21, 1982 (the envelope which contained his brief is so stamped), and it was not received at my office until July 22, 1982. Counsel for the General Counsel moved to strike the Company's brief as untimely filed citing Sec. 102.114(b) of the Board's Rules and Regulations, as amended, which states a brief "must be received by the Board or the officer or agent designated to receive such matter before the close of business on the last day of the time limit, if any, for such filing or extension of time that may have been granted." Counsel for the Company opposed the motion to strike, asserting he placed his brief in a mailbox on July 19, 1982, that he did not examine counsel for the General Counsel's brief before dispatching his brief, that the delayed date for filing resulted from counsel for the General Counsel's request for an extension of time, and that no prejudice to counsel for the General Counsel occurred as a result of the late filing. Counsel for the Company further petitioned, in any event, for an order permitting the late filing of his brief. I am persuaded to grant the petition; it is apparent no prejudice to the General Counsel occurred due to the late filing and the issue deserves full explication from all parties.

Based on my review of the entire record, observation of the sole witness, perusal of the briefs, and research I enter the following:

SUPPLEMENTAL FINDINGS OF FACT

The Rejected Bills

As noted above, the court upheld the Company's contention that Administrative Law Judge Welles erred by accepting into evidence two representative freight bills to establish the Board's jurisdiction, on the ground the witness who sponsored their introduction was not qualified to authenticate those bills as part of the business records of her employer and therefore within the business records' exception to the hearsay rule.

To meet that requirement, the two bills were reintroduced before me under the sponsorship of William Stevens, assistant manager of SP's central collection accounting section. Stevens testified at all pertinent times it was his responsibility to issue freight bills covering shipments over the SP system, secure payment therefor, and insure those bills were accurate and in compliance with rules, regulations, and tariffs established by the state and Federal agencies which regulate interstate and intrastate shipments by common carriers; that he at all pertinent times was the custodian of the SP records maintained to accomplish those functions; that the two representative freight bills which were introduced before Administrative Law Judge Welles were maintained by SP among the records under his custody and were prepared by SP and an interlining carrier, Burlington Northern RR (BN), for the purpose of showing the shipper, the type and weight of the shipment, the equipment used to transport it, the route the shipment traveled, the customer to whom the shipment was consigned for delivery, and the charges for its transport.

Stevens testified the two bills show that in October 1978 California Cascade Industries caused BN to pick up a flatcar load of Douglas fir lumber at Peshastin, Washington; that the lumber was picked up and placed on BN car No. 62435 at Peshastin and transported by BN to Klamath Falls, Oregon; that California Cascade subsequently directed the carload be delivered to Economy Lumber at Oakland, California; that car No. 62535 and its load were picked up at Klamath Falls, Oregon, by SP, transported to Oakland, California,[2] and delivered to Economy Lumber there in November 1978; that the shipment weighed 112,300 pounds; and that the transportation charges of the two carriers over the entire route totaled $1,562.52, plus an additional (demurrage) charge of $206.42.[3]

Stevens demonstrated a complete familiarity with the codes and practices utilized in preparing the bills, explained each and every notation thereon, stated he had a vital interest in assuring the accuracy of the information contained therein and the information thereon was accurate.

Stevens was an impartial and unbiased witness and impressed me with the scope and accuracy of his knowledge of the billing practices in the industry, that of his employer and BN, and the truthfulness of his testimony. I credit the testimony recited above and find the two bills demonstrate in October 1978 California Cascade caused BN and SP to transport a carload of lumber from the State of Washington to the State of California and deliver it to Economy Lumber at Oakland, California, in November 1978. I further find the bills of lading so establishing were and are admissible into evidence as valid business records maintained by SP in the regular course of its activities.

Commerce

At the hearing before Administrative Law Judge Welles, the parties stipulated the two bills of lading introduced both here and at the prior hearing, *when and if properly authenticated*, would be treated as representative of over 100 similar bills establishing the delivery to Economy, from outside California, shipments of Douglas fir lumber for use in its business valued at $769,958 during the period May 1, 1978, through May 1, 1979; that Economy's total Douglas fir lumber purchases during that period were valued at $1,544,614; that during that period First Termite purchased $20,000 worth of Douglas fir from Economy; that since Economy commingled the $769,958 worth of Douglas fir it purchased outside of California and the $744,856 worth of Douglas fir it purchased within California, it was impossible to determine that portion of the $20,000 worth of Douglas fir First Termite purchased during the period in question came from points outside of California and what portion came from points inside California.

Administrative Law Judge Welles held it was reasonable to conclude more than a *de minimis* portion[4] of the $20,000 in Douglas fir purchased by First Termite from Economy during the period in question came from outside of California, and therefore one might legitimately conclude interstate commerce would be affected by a labor dispute between First Termite and its employees. I concur in that reasoning.

I therefore find and conclude at times pertinent First Termite was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

Additional Contentions

In his brief and argument, counsel for First Termite renewed his contentions that: (1) First Termite is not a "retail establishment" within the Board's jurisdictional criteria, and (2) the reinstatement order was improper. The Board rejected the former, it issued the latter, and the court did not rule on either, so I find these matters are not properly before me under the terms of the remand.

[2] BN does not enter California.

[3] Due to the time the carload waited at Klamath Falls for delivery instructions.

[4] The Board has held purchases of goods valued at $1,500 which traveled across state lines to their purchaser was not *de minimis*. *Marty Levitt*, 171 NLRB 739 (1968).